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No. 01-1277

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government devotes the great bulk of its response to the question of whether petitioner's Fifth Amendment claim was procedurally barred even though it was based on extra-record evidence that could not have been introduced at trial. In doing so, the government entirely skips over the many reasons why certiorari should be granted in this case. First, the government does not dispute the fact that the petition raises a significant issue of habeas corpus procedure that this Court has not addressed in over thirty years. Second, the government denies that there is a split in authority on this issue only by citing cases for a broad proposition over which the courts do not disagree, all the while ignoring the question over which there is discord. Third, despite the government's opposition, it is still fully apparent that petitioner would be entitled to relief in the event of a favorable ruling. Fourth, the government's claim that the district court did not procedurally bar petitioner's Fifth Amendment claim misstates the procedural history of this case. While the district court did invoke the merits as an alternative ground for denying the certificate of appealability, the court's ruling on the merits was in error and is the basis for the second question before the Court.

On the second question, which presents the merits of petitioner's Fifth Amendment claim, the government does not even attempt to defend the district court's decision or to deny that its decision conflicts with this Court's jurisprudence or decisions from other courts. The government instead attempts to describe this case as a poor vehicle for addressing the issue. For the reasons set forth below, however, the government's thinly veiled attempt to bury this Court in case-specific facts does not detract from either the compelling need for Supreme Court review or the fact that this case indeed provides a perfect vehicle for the resolution of this important issue.

I. The Government's Response Does Nothing To Undermine The Importance Of Petitioner's Procedural Question.

First, and most remarkably, the government fails to address the fact that this case presents the Court with a perfect vehicle to address an area of the law of procedural bar left unaddressed in more than thirty years of Supreme Court jurisprudence. As described in the petition, this Court's habeas corpus procedural bar cases can be sorted by two attributes: whether the case involved review of a state conviction (section 2254) or a federal conviction (section 2255), and whether or not the issue raised on collateral review had been raised on direct review. Consequently, this Court's decisions fall into four general categories. In the last thirty years this Court has abandoned preexisting precedent and laid down new rules in three of these categories. Petitioner asks this Court to consider the fourth.

The new rules in three of the four categories are well settled: (1) A state prisoner must show cause and prejudice for failing to raise an issue on direct appeal in state court. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), *rejecting Fay v. Noia*, 372 U.S. 391, 438 (1963) (stating that federal court may hold issue forfeited when prisoner "deliberately bypassed" state court appellate process). (2) Likewise, a federal prisoner must show cause and prejudice for failing to raise an issue on direct appeal in federal court. *Davis v. United States*, 411 U.S. 233, 242 (1973). (3) It is also clear what standards apply when a state prisoner invokes section 2254 to introduce extra-record evidence in support of a claim he *did* raise, unsuccessfully, on direct appeal in state court. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992), *overruling Townsend v. Sain*, 372 U.S. 293, 313 (1963) (allowing federal courts discretion to deny an evidentiary hearing only when "the state-court trier of fact has after a full hearing reliably found the relevant facts").

This Court's precedent has remained unchanged in one context, however. *Kaufman v. United States*, 394 U.S. 217, 226-227 (1969), still is the controlling authority when a federal prisoner seeks section 2255 review of issues that were raised on direct appeal. *Kaufman* held that when a federal petitioner presents a claim on collateral review that was raised on direct appeal, "discretion may in a proper case be exercised against the grant of a § 2255 hearing." 394 U.S. at 227 n.8. When, however, "the material facts were not adequately developed" at trial, it is appropriate for the section 2255 court to conduct an evidentiary hearing. *Id.* at 226 (quoting *Townsend v. Sain*, 372 U.S. 293, 313 (1963)).[1]

The government acknowledges this much. Br. in Opp. 10. Yet some courts—either failing to distinguish between the section 2254 and section 2255 contexts or perhaps anticipating the demise of *Kaufman*—have held that a court does not have any discretion under section 2255 to entertain an issue raised on direct appeal unless "cause and prejudice" are shown. Thus, the time is ripe for this Court to reaffirm, revise, or reject the rule of *Kaufman*.

As explained in the petition (at 16-18, 20-21 n.7), revisiting *Kaufman* also will allow this Court to address four major tensions in the jurisprudence of habeas corpus procedure that are

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[1] As set out in the petition, petitioner's Fifth Amendment claim requires extra-record evidence of the government's assurances about the way the government could use petitioner's proffer at trial. Petitioner contends that the AUSA assured him that his self-incriminatory statements would only be admissible if petitioner took the stand and contradicted something in the proffer. At the government's urging, however, the district court ultimately agreed to admit the proffer statements—though petitioner had never taken the stand—because defense counsel's examination of other witnesses supposedly implied a legal theory inconsistent with the proffer. In so doing, the court recognized that its ruling essentially meant that defendants would trigger the admissibility of proffer statements simply by pleading "not guilty." 9/11/95 Tr. 2369.

at the root of the confusion in the lower courts on the rules governing issues raised under section 2255 that were raised on direct appeal:

(1) This Court will be able to clarify the extent to which more recent rulings in the section 2254 context affect older precedents in the section 2255 context.

(2) This Court will be able to revisit the language of section 2255—text that the AEDPA changed far less than the text of section 2254—to provide guidance on the statutory interpretation of section 2255 at a time when courts rely more on section 2554 cases than the text of section 2255 itself.

(3) This Court will have the opportunity to explain the relevance of precedents from the section 2254 context when applied to a context without the important concerns of comity between courts and federalism that are so salient in federal review of state court convictions.

(4) This Court also will be able to address the tension in the section 2255 context between the virtually unanimous view of federal courts that extra-record evidence justifies Sixth Amendment ineffective assistance claims on collateral review, even if these claims were raised on direct appeal, and the litany of federal decisions on the issue of whether extra-record evidence justifies hearing other constitutional claims on collateral review.[2]

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[2] In fact, the Solicitor General has taken the position before this Court that ineffective assistance of counsel claims should be brought under section 2255 rather than direct appeal because, *inter alia*, those claims generally "require[ ] consideration of matters that are outside the record on direct appeal." Resp. Br. at 6, *Billy-Eko v. United States*, No. 92-7897 (1993), quoted in *United States v. DeRewal*, 10 F.3d 100, 103 (3d Cir. 1993). There is no reason that this Court, or the Solicitor General, should ignore this reasoning in the face of a Fifth Amendment claim.

Second, the government's response misses the nagging circuit split that would be resolved by this Court's review. The government cites strings of cases that stand for the unremarkable proposition that a section 2255 petition generally may not be used to litigate an issue that was raised and decided on direct appeal. Petitioner does not contest that it is the general practice of the federal courts to deny consideration of issues raised in a section 2255 petition that were raised on direct appeal.[3]

But, as Judge Posner notes in *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991), "[i]t is easy to confuse a practice with a rule." The government's uncontroversial claim that relitigation is disfavored completely ignores the issue presented by the petitioner: the standard for determining when a section 2255 petitioner is entitled to an evidentiary hearing to develop extra-record evidence. On this issue, the federal courts employ substantially different standards. As described in the petition,

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[3] Indeed, most of the cases cited by the government are cited in the petition. Of the cases not discussed in the petition but introduced by the government, most do not elaborate on the applicable standard. *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993), and *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989), say nothing more than that issues raised on direct appeal "generally" may not be considered on collateral review under section 2255. (In any case, *Prichard* predates *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (en banc), which applies the cause-and-prejudice standard to all section 2255 claims raised on direct appeal.) *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999), merely restates the general requirement of "exceptional circumstances," and *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991), refers obliquely to "an uphill battle."

Two of the government's cases provide additional evidence of the need for Supreme Court review, given that they describe standards that are consistent with neither *Kaufman* nor the procedural default cases. *United States v. Sanin*, 252 F.3d 79, 83 (2d Cir. 2001), would allow reconsideration "only where there has been an intervening change in the law." Accord *Garris v. Lindsay*, 794 F.2d 722, 726 (D.C. Cir. 1986) (involving an appeal from the District of Columbia court system seeking a certificate of probable cause under section 2253).

some courts follow *Kaufman*'s standard giving courts discretion to entertain petitions based on new evidence, while other courts have applied other standards, including the onerous cause-and-prejudice standard imported from procedural default cases. None of this is disputed by the government.

Third, under the facts of this case, the government's opposition offers nothing to cast any doubt that petitioner is entitled to relief under the correct legal rule. In response to this claim, the government makes the uncontroversial point that a federal court should not grant an evidentiary hearing when the new facts alleged by a section 2255 petitioner could reasonably have been introduced at trial. Br. in Opp. 11; see also Pet. 12 n.2. In doing so, the government ignores altogether the fact that the evidence petitioner seeks to introduce at a hearing on his Fifth Amendment claim could not reasonably have been introduced at trial. For example, AUSA King could not reasonably have been expected to testify to the admissibility of the proffer he sought to introduce into evidence. Petitioner was also hushed by the court when he attempted to argue that he was misled about the terms of the proffer agreement. See Pet. 19-20 & n.6.[4]

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[4] Because the district court employed an erroneous procedural bar standard, it did not rule on whether the petitioner reasonably could have introduced the evidence at trial. In its response, the government refers to a hearing on petitioner's motion for reconsideration, Br. in Opp. 4-5, but this hearing provides no basis for claiming either that the trial record already includes the facts necessary to petitioner's Fifth Amendment claim or that petitioner had an opportunity to make them part of the record at trial. Petitioner raised his factual claims in an affidavit submitted to the district court in conjunction with his section 2255 filings. And the government never once claimed that the facts sworn to in the affidavit were already in the record or that petitioner could have introduced them before the trial court. The government has accordingly waived any claims to this effect. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below"). Nor would such a claim make any sense here. It would be wholly absurd to argue, for example, that AUSA

Fourth, the government tries to pretermit the procedural bar issue by arguing that "the basis of the district court's decision was that the specific extra-record evidence identified by petitioner was not material to this claim—not that he was procedurally barred." Br. in Opp. 9. This is wrong. The court clearly held that petitioner was procedurally defaulted. In denying petitioner's section 2255 motion, the district court made a single holding with respect to petitioner's Fifth Amendment claim: that the claim was procedurally barred, saying that petitioner "may not avoid the procedural bar and take a second bite at the apple." Pet. App. 10a. In denying the request for a certificate of appealability, the district court defended its procedural bar holding, but added an alternative argument that even if the court considered the evidence offered by petitioner, the evidence was not material to petitioner's claim. *Id.* at 22a. As explained below, however, this alternate holding is erroneous and itself presents the second question presented in the petition—an issue that equally warrants a grant of certiorari. Because the district court's ruling that petitioner's evidence was not material was clearly wrong, it is appropriate for this Court to consider the procedural bar issue raised by the district court's primary holding as to the Fifth Amendment claim.

II. This Case Presents An Ideal Vehicle For Addressing The Merits Of Petitioner's Fifth Amendment Claim.

The government addresses Question 2 only briefly, and it does not even attempt to deny that the district court's holding, *i.e.*, that whether the prosecutor misrepresented the possible uses of petitioner's self-incriminating proffer at trial is immaterial under the Fifth Amendment, is at odds with decisions by this Court and numerous lower federal courts. Instead, the government attempts to characterize this case as a poor vehicle for addressing

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King's statements at a hearing are a substitute for the full cross-examination sought by petitioner in support of his 2255 petition.

the merits of this significant Fifth Amendment issue. The government's efforts in this regard, however, are wholly misplaced.

First, the government claims that Question 2 is somehow limited to its facts. See Br. in Opp. 12. But that is plainly not so. The district court's holding was sweeping: in the court's view, the fact that "the Assistant United States Attorney * * * misled [petitioner] regarding the circumstances under which the Government would seek admission of his proffer statements," "even if true, do[es] not bear significantly on the question of whether [petitioner] knowingly and voluntarily waived certain rights by signing the proffer agreement." Pet. App. 22a. This holding raises a question unmoored from any particular set of facts—namely, whether a defendant can be said to have knowingly, intelligently, and voluntarily waived his Fifth Amendment rights if he "was induced to make incriminating proffer statements to the government based upon the prosecutor's false assurances as to the circumstances in which the petitioner's statements could be used against him." Pet. i. As the series of cases addressing this question makes plain, see *id.* at 23-25, this is a recurring issue of substantial importance to the Fifth Amendment rights of criminal defendants.

Second, the government contends that "petitioner did not establish the factual predicate for his claim [at trial] such as by filing an affidavit describing the prosecutor's alleged misrepresentations." Br. in Opp. 12. But the habeas court did not reject petitioner's Fifth Amendment claim on some theory that he should have proffered an affidavit at trial. Nor did the government make any such contention below, and this claim is therefore waived. See *supra* p. 6 n.4. The court instead unambiguously held that petitioner's allegations of prosecutorial misrepresentation were immaterial to his Fifth Amendment claim "even if true." Pet. App. 22a. That ruling is squarely presented for review by this Court.

Finally, the government claims that "any error in allowing the government to use the proffer at trial was harmless," citing the district court's finding that petitioner had not shown "prejudice" arising from his attorney's alleged ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Br. in Opp. 12. The government does not, and cannot, claim that the district court's *Strickland* finding somehow implies or necessitates a finding of harmless error, however. Indeed, this Court has made plain that a defendant's burden of proving prejudice under *Strickland* is *higher* than the burden of proving harmless error on habeas review. See *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (explaining that harmless error standard applicable in federal habeas is less burdensome on criminal defendants than prejudice showing required under *Strickland*). Letting the jury hear what the trial court described as an "admi[ssion of] * * * guilt," 9/12/95 Tr. 2431, was of unquestionable importance to petitioner's case. As this Court recognized (in the course of rejecting a harmless error argument where a confession was erroneously admitted), "[a] confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The Court explained:

> [It] is probably the most probative and damaging evidence that can be admitted against [a defendant]. * * * [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Ibid. (internal quotation marks omitted); see also *id.* at 313 (Kennedy, J., concurring) ("If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its

decision on that evidence alone, without careful consideration of the other evidence in the case").

Nothing in the district court's findings suggests that the admission of petitioner's proffer here, if constitutionally erroneous, was harmless.[5] Nor is the government in any position to claim that the admission was harmless, having fought to introduce petitioner's proffer during its rebuttal case and thus revealing the government's own view that its case-in-chief was vulnerable without it.

CONCLUSION

The petition for writ of certiorari should be granted for this Court's resolution of the questions presented on their merits. Alternatively, the decision of the court of appeals should be vacated and the court of appeals instructed to issue a certificate of appealability as to the questions raised in the petition.

Respectfully submitted.

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[5] Among the adverse evidence the government culls from the district court's opinions is the purported fact that petitioner used bond proceeds to buy a car "and to make a payment on his yacht." Br. in Opp. 7. Petitioner would have denied those assertions at trial, but he believed that he risked admission of the proffer if he took the stand and refuted any misstatements in the government's case. Had petitioner known that the proffer would come in anyway, he would have taken the stand and corrected such misstatements.